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Supreme Court of the United States,

OCTOBER TERM, 1929.

No. 79.

HARRY C. MOORE, AS TREASURER OF GRANT COUNTY, INDIANA,
Petitioner,

vs.

SIDNEY Z. MITCHELL AND NIEL A. WEATHERS (SUED AS NEIL A. WEATHERS), AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RICHARD EDWARDS BREED, DECEASED,
Respondents.

BRIEF FOR RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GRAHAM SUMNER,
Counsel for Respondents.

LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
FRANCIS H. HORAN,
On the Brief.

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Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 79.

HARRY C. MOORE, as Treasurer of Grant County, Indiana,
Petitioner,

vs.

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (sued as NEIL A. WEATHERS), as Executors of the Last Will and Testament of RICHARD EDWARDS BREED, Deceased,
Respondents.

BRIEF FOR RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Supplemental Statement.

The Writ of Certiorari is to review the decision of the United States Circuit Court of Appeals for the Second Circuit affirming an order of the District Court of the United States for the Southern District of New York granting a motion made by the respondents to dismiss the complaint herein on the ground that the complaint did not state a cause of action of which the Court would take jurisdiction.

(Tr. fols. 23-24.) Opinions were rendered by Judge Knox in the District Court (Tr. fols. 25-27), and by the Circuit Court of Appeals (Tr. fols. 35-46.)

The action was brought by the plaintiff as Treasurer of Grant County, Indiana, to recover the sum of $982,516.22 with interest, against the defendants as executors of the Last Will and Testament of Richard Edwards Breed, deceased, for personal taxes for the years 1903 to 1926, inclusive, alleged to have been assessed against the decedent after his death as a resident of Grant County, Indiana, by the taxing authorities of said County. (Complaint, Paragraphs VI and VII, Tr. fols. 11-16.)

It appears from the complaint (Paragraph III, Tr. fols. 6-7) that the defendants are not sued in their individual capacities, but solely in their capacities as executors and that the defendants were qualified and appointed as such executors by the Surrogates' Court of the County of New York. The complaint does not allege that any of the decedent's property, referred to in Paragraph IV (Tr. fols. 7-10), was ever physically within the State of Indiana and, similarly, the complaint does not allege that the defendants were ever personally within the State of Indiana or that the decedent died there.

The complaint alleges two causes of action, the first of which is based upon an alleged indebtedness of the decedent and the defendants as executors to Grant County, Indiana, and its political subdivisions, for the taxes alleged to have been assessed against the decedent after his death, and the second of which is based upon an alleged unjust enrichment of the decedent and the defendants as executors by reason of the failure to pay such taxes. The action does not seek the enforcement of any lien and the plaintiff's effort is simply to enforce in the Federal Court sitting in New York against the defendants as executors an alleged personal liability of the decedent for taxes which was not liquidated until after his death.

The narrow question now presented in this case is whether or not the District Court for the Southern District

of New York should have taken jurisdiction of this action by the Treasurer of Grant County, Indiana, to collect taxes alleged to be due to the said county, assessed in the manner alleged in the complaint after the death of the decedent. The lower courts have held that it should not. If this Court should hold that the lower courts were right this litigation will be ended. If this Court should hold that they were wrong and that the District Court for the Southern District of New York should take jurisdiction of this action it will then be open for the defendants to answer the complaint and, if they are so advised, attack the validity of the Indiana legislation under which an attempt was made to assess the tax and to attack the action of the taxing authorities thereunder. The position of the defendants at this time before this Court is, that assuming for present purposes that the taxing authorities of Grant County, Indiana, went through certain forms of procedure to assess these taxes, the liability alleged to arise therefrom should not be enforced in the Federal Court sitting in New York. Much of the petitioner's brief is concerned with the argument that the action of the taxing authorities of Grant County, Indiana, in assessing the taxes after the decedent's death gave rise to a personal liability. This argument does not require consideration unless this Court concludes that the District Court should have taken jurisdiction if the taxes were validly assessed. Our position is that even if they were validly assessed the District Court properly refused to take jurisdiction.

The petitioner was and is unable to produce any decision or dictum by any court anywhere to sustain the jurisdiction claimed by him in this case. There are a multitude of authorities sustaining the action of the courts below which we shall refer to in Point I of this brief. One of the serious considerations mentioned by the District Court in its opinion (Tr. fol. 26), is that the claim asserted by the plaintiff is not recognized in the Surrogates' Court of New York County from which the defendants as executors derived their authority to act and to which they are responsible. In that Court they would not be free to pay the petitioner's claim and they

would not be required to pay it, because the Court of Appeals of the State of New York and the Surrogates' Court of New York County have held in *State of Colorado* v. *Harbeck, infra,* and *Matter of Anita Bliss, infra,* respectively, that taxes due to another state cannot be collected in the State of New York and are not debts of a decedent's estate. In the circumstances it seems entirely proper that the Federal Court sitting in New York should refuse to entertain jurisdiction of this action.

With reference to the concern expressed by the petitioner that the amount in controversy be paid to Grant County, it may be noted that the statute which purports to authorize the plaintiff to maintain this action, appearing in Paragraph IX of the complaint (Tr. fol. 19), contains a provision for his compensation which is not set forth in the complaint. This statute, Indiana Session Laws of 1927, chapter 54, page 141, Section 1, contains the following provision:

> "* * * said treasurer, in his name as such officer, may, or whenever requested so to do by the board of county commissioners, shall, at any time after delinquency, institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the State of Indiana, or by his legal representatives, whenever either said treasurer or said board, as the case may be, determines a reasonable probability exists that the said delinquent taxes, or a substantial part thereof, can be collected in this or any other state by such suit or proceedings, *and for his services in so doing the said treasurer shall charge and receive twenty-five per centum of such money so collected:* * * *." (Italics ours.)

POINT I.

Under the American and English authorities it is settled that the revenue laws of one sovereign are not to be enforced in another sovereignty.

(a) The American authorities in both federal and state courts universally recognize the principle of private international law which forbids the enforcement by one sovereign of the revenue laws of another.

(b) The English decisions without exception recognize the same rule.

(c) There is good reason for the rule recognized by the decisions and its application is peculiarly appropriate in the present case.

The structure of the petitioner's brief makes it somewhat difficult to present the argument for the respondents in an orderly fashion by following the numerical order of the petitioner's points. Accordingly, with the Court's indulgence, we shall deal in this point with the matters mentioned in the title, which affect the petitioner's points III, IV, VII, and VIII.

(a)

The American authorities in both federal and state courts universally recognize the principle of private international law which forbids the enforcement by one sovereign of the revenue laws of another.

The petitioner now frankly concedes that in this action he is endeavoring to have the Federal Court sitting in New York take jurisdiction of an action to collect taxes alleged

to be due to the political subdivisions of the State of Indiana. The nature of the alleged liability is not changed by its description in the complaint as an "indebtedness" on the part of the defendants. It is purely and simply an action to collect taxes claimed by Grant County, Indiana, which were assessed after the death of decedent. As this Court said in *Meriwether* v. *Garrett*, 102 U. S. 472 (1880), at pages 513-514:

> "Taxes are not debts. It was so held by this court in the case of *Oregon* v. *Lane County*, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *City of Augusta* v. *North*, 57 Me. 392; *City of Camden* v. *Allen*, 2 Dutch. (N. J.) 398; *Perry* v. *Washburn*, 20 Cal. 318. Nor are they different when levied under writs of mandamus for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. * * *"

The District Court and the Circuit Court of Appeals for the Second Circuit concluded that the District Court for the Southern District of New York should not be employed as a tax collector for Grant County, Indiana, and refused to take jurisdiction of the suit. The District Court, in the course of its opinion, said:

> "As a result of what has been said, I do not conceive it to be the duty of this Court, notwithstanding the weight of insistence to the contrary, to undertake the enforcement within the State of New York, of the revenue laws of Indiana." (Tr. fol. 27.)

In the opinion of Judge Manton in the Circuit Court of Appeals, concurred in by Judge Augustus N. Hand, which affirmed the order of the District Court, it was said:

> "With the appellees and the property without the state, and the estate being administered in New York,

the effort to collect a tax, for a political sub-division of Indiana, is repugnant to the settled principles of private international law which preclude one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state is, by the Federal Constitution, limited to persons and property within its jurisdiction. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265." (Tr. fol. 37.)

Wherever the question has arisen, the American courts have held uniformly that taxes due to one sovereignty will not be enforced outside of the territorial jurisdiction of that sovereignty. While the question does not seem to have been passed upon squarely by this Court, this Court said, in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265 (1888), at page 290:

> "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for *the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue,* or other municipal laws, and to all judgments, for such penalties." (Italics ours.)

In *Ashley* v. *Ryan*, 153 U. S. 436 (1893), this Court said, at page 440:

> "Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed; for, whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, *or involved the assertion of the right of a State to exercise its power of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.*" (Italics ours.)

In *New York Trust Company* v. *Island Oil & Transport Corporation*, 11 F. (2d) 698 (1926), the Circuit Court of Appeals for the Second Circuit had occasion to pass upon a

similar question. In that case the State of Virginia had assessed franchise taxes against a Virginia corporation for which receivers had been appointed by the District Court for the Southern District of New York. The receivers applied to the District Court for instructions as to whether or not they should pay the franchise taxes to the State of Virginia. Judge Knox authorized the payment of the taxes, and on appeal, the Circuit Court of Appeals affirmed the order, saying, in an opinion by the late Judge Hough, at page 699:

> "* * * if the receivers in the exercise of their business discretion deem it expedient to pay this tax, they are authorized so to do; but they are not required to do it, because the State of Virginia has no legal right to demand payment from them."

In discussing the question as to whether or not the State of Virginia was entitled to the taxes as a matter of law, it was said, at page 699:

> "If, however, in this suit and in the State of New York, Virginia had appeared and demanded payment, we think it could not have recovered.
>
> "Undoubtedly Virginia can go on taxing its own corporation as long as that corporation exists; but its right to recover against any property must rest either upon its sovereign power or upon statutes passed in pursuance thereof. But neither its sovereignty nor its statutes has any extraterritorial vigor."

The question has been passed upon squarely by the Court of Appeals of the State of New York in *State of Colorado* v. *Harbeck*, 232 N. Y. 71 (1921). In that case the State of Colorado sought to recover an inheritance tax upon the estate of a resident of Boulder, Colorado, who had died in the City of New York. His will and codicils thereto were admitted to probate in the Surrogates' Court of New York County and letters testamentary thereunder were duly issued. Transfer tax proceedings were had in New York. No provision was made for the payment of a transfer tax to the State of Colorado. Thereafter, the State of Colorado

attempted to assess taxes upon the estate as the estate of a resident of Colorado, and took the proceedings authorized by the Colorado statute. No part of the decedent's estate was physically present in Colorado at the time of his death or thereafter, and none of the defendants appeared in the Colorado proceedings or was a resident of Colorado. The Court of Appeals affirmed a judgment dismissing the complaint, and said, at page 83:

> "Although a liability to pay the tax exists under the Colorado statute, jurisdiction and power to enforce the liability in the New York tribunal must be established. Under the due process clause of the United States Constitution, where the delinquents are non-residents of the taxing state and outside its jurisdiction, so that no personal liability or enforcible duty may be established as against them and where the property involved is without the taxing state so that no *res* exists upon which the taxing state may impose a lien, the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenue. (*Pennoyer* v. *Neff*, 95 U. S. 714; *Dewey* v. *Des Moines*, 173 U. S. 193; *City of New York* v. *McLean*, 170 N. Y. 374, 387, 388; *Matter of Maltbie* v. *Lobsitz Mills Co.*, 223 N. Y. 227.)
>
> "But plaintiff contends that by the application of a familiar fiction of law the legal situs of decedent's personal property attaches to his domicile in Colorado, although the property was in every reasonable sense within the state of New York, where the stocks, bonds and credits were kept, and that Colorado has an enforcible lien thereon by virtue of the taxing order. A sufficient answer to this contention is that the judgment in suit imposes a personal liability only and enforces no lien. A further answer is that *mobilia sequuntur personam* is not an exclusive rule of universal application nor does it transfer property into the foreign from the domestic jurisdiction. It is a rule of convenience merely, permitting taxation at the domicile of the owner of personal property which may at the same time be subject to taxation where the property itself is permanently located. (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Union Refrigerator Transit Co.* v. *Ken-*

tucky, 199 U. S. 194, 206; *People ex rel. Hoyt* v. *Commissioner of Taxes,* 23 N. Y. 224, 227; *Maxwell* v. *Bugbee, supra.*) This state taxes the succession of personal property of non-residents according to the actual situs of the thing (*Matter of Romaine,* 127 N. Y. 80, 89) and our courts may not say that the assets of the estate are at the same time actually within and without the state of New York. The tangible *res* was, therefore, at all times in New York and not in Colorado.

"If these general and well-recognized principles of taxation are by any process of reasoning to be considered inapplicable to the collection of transfer taxes, a sufficient answer to the contention of the state of Colorado remains. When a statutory method of enforcing the collection of a tax is provided which requires judicial action before the liability of the taxpayer is finally fixed it is exclusive and must be followed. That it cannot be followed does not alter the case. The order which was entered in Colorado in the proceeding to fix the tax on notice by mail to defendants did not terminate a suit or controversy between parties and is not a judgment either *in personam* or *in rem.* (*People* v. *Kellogg,* 268 Ill. 489.) After the tax has been assessed by the preliminary order no person can be compelled to pay it until a citation issued out of a Colorado court having jurisdiction has been regularly served on him and he has had an opportunity to be heard. Unless this notice is given, the constitutional right to due process of law is invaded. (*Matter of McPherson,* 104 N. Y. 306, 321.) The Colorado statute thus provides (§§ 18, 19) for a proceeding to collect the tax, subsequent to the assessment, on notice to the persons interested in the property, in the nature of an action *in rem.* 'A statutory remedy or proceeding cannot be enlarged by construction nor be made available or valid except by strictly following the directions of the act.' (*Matter of Maltbie* v. *Lobsitz Mills Co., supra,* p. 232; *Oakman* v. *Small,* 282 Ill. 360.)

"But it is urged that the right of the state of Colorado to maintain an action for the collection of the tax when the special remedy is ineffective, is upheld by its local laws (*Pinnacle G. M. Co.* v. *People,* 58 Col. 86); that the Colorado statute provides that the attorney-general may collect the tax in 'any other manner as may be provided in this act *or by law*' (Act of 1916, § 13),

i. e., by a common-law action. This contention also is unsound. The attempt to give such a statutory provision extraterritorial effect would conflict with another well-settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another. The remedy is a part of the law and we are once more brought to face the doctrine that the taxing power of the state is by the federal Constitution limited to persons and property within its jurisdiction. (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Marshall* v. *Sherman*, 148 N. Y., *supra*, pp. 24-26; *Loucks* v. *Standard Oil Co.*, *supra*, p. 102; *Walker* v. *Treasurer, etc.*, 221 Mass. 600; *City of New York* v. *McLean*, *supra*.)"

Attempt is made by the petitioner to distinguish the *Harbeck* case in Point VIII of his brief, pages 59 to 71, on the ground that it involved an extraterritorial imposition of the tax, which the petitioner concedes would be contrary to well-established principles of constitutional and international law, but the petitioner argues that this extraterritorial imposition of tax is to be distinguished from an extraterritorial enforcement of tax. We shall discuss this attempted distinction under subdivision (d) of the present point of this brief. The *Harbeck* case was decided upon two grounds, the first was the constitutional ground that Colorado had no jurisdiction to impose a tax, and the second ground was that under the principle of private international law, as stated in the *Harbeck* decision, which "* * * precludes one state from acting as collector of taxes for a sister state and from enforcing its penal or revenue laws as such", the action could not be maintained in the New York state courts. The attempt in the present case, like that made in the *Harbeck* case, is repugnant to the same two principles.

The petitioner contends that the *Harbeck* case is in effect overruled by the decision of this Court in *Blodgett* v. *Silberman*, 277 U. S. 1 (1927). This argument is adequately dealt

with in the opinion of Judge Manton in the Circuit Court of Appeals in which he said:

> "But it is said that *Blodgett* v. *Silverman*, 277 U. S. 1, overrules what is said in the *Harbeck* case. The *Blodgett* case did not deal with the question of extra-territorial enforcement of state tax statutes which is presented in this case. That case involved the question of whether the State of Connecticut could tax the transfer of certain intangible personal property under a will probated in Connecticut and collect the tax in a Connecticut court against executors appointed by the Connecticut Court of Probate. The deceased was domiciled in Connecticut at the time of his death. The court decided that intangible personalty has such a situs as the domicile of its owner and its transfer on his death may be taxed there. No question of jurisdiction of the State of Connecticut over the executors was presented. The decision in the *Blodgett* case was limited to upholding a transfer tax upon intangibles in a court which had jurisdiction to tax. That principle is recognized in the cases we have referred to.
>
> "Assuming Breed was domiciled in Indiana, as alleged in the complaint, the taxes were not assessed until after his death and until after the appellees were administering his estate in the jurisdiction of the New York Surrogates' Court. The amount of the tax had not been ascertained and no attempt was made to impose the taxes prior to death. The Indiana statute imposes a duty upon the resident to report taxable property. It creates no liability before the amount of taxes claimed is determined. It was necessary for the taxing authorities to assess the taxes and determine the amount claimed to be due. It is not a transfer tax or a succession tax claimed, but a personal property tax. The application of the fiction of *mobilia sequuntur personam* would require an assessment during each of the years for which taxes are claimed. during the lifetime of the decedent, to reach the conclusion that there was a personal liability to pay these taxes during his life. Jurisdiction is not to be founded upon a multiplication of fictions and in no true sense can it be said that Indiana had jurisdiction to impose the taxes for which this suit is brought." (Tr. fols. 40-42.)

It is apparent that since the *Blodgett* case did not deal at all with the problem of extraterritorial enforcement that decision does not affect the decision of the Court of Appeals in the *Harbeck* case on the point of extraterritorial enforcement. At most, the decision in the *Blodgett* case would furnish a guide to the Court of Appeals for determining the extent to which the fiction of *mobilia sequuntur personam* might be applied in certain circumstances. We do not understand that the *Blodgett* case has the effect of overruling the *Harbeck* case even on this point.

There are other American authorities sustaining the result reached by the lower courts in the present case. In *Matter of Anita Bliss,* 121 Misc. 773 (1923), the State of Vermont objected to the account of a New York executor filed in the Surrogates' Court of New York County, on the ground that it did not provide for the payment of transfer taxes claimed to be due to the State of Vermont, the state of conceded domicile, where an independent probate proceeding had been conducted. The State of Vermont asked that after the payment of administration expenses, taxes due the State of New York and debts due New York creditors, the assets be transferred to the executors appointed by the Vermont court for final distribution, or in the alternative, that no distribution be decreed until all taxes due the State of Vermont had been paid. The court dismissed the objections and said, after discussing the *Harbeck* case, at page 776:

> "The relief sought is the same in each case. Vermont cannot employ our courts as agencies to enforce the collection of its taxes. See, also, *People* v. *Kellogg,* 268 Ill. 489; *Walker* v. *Treasurer,* 221 Mass. 600; *State of Iowa* v. *Slimmer,* 248 U. S. 115. The claim that taxes are due does not make the state of Vermont a creditor of the decedent's estate. Transfer taxes are not debts. *State of Colorado* v. *Harbeck, supra; City of Rochester* v. *Bloss,* 185 N. Y. 42, 47; *City of New York* v. *McLean, supra.*"

In *State of Maryland* v. *Turner,* 75 Misc. 9 (1911), the court sustained a demurrer to a complaint in an action whereby the State of Maryland sought to recover from the defendant a sum equal to the amount of taxes assessed against him while he was a resident of Maryland. The complaint alleged, moreover, that the highest courts of Maryland in interpreting its tax laws had held that by the assessment of the tax, a legal duty and obligation was created under and by which the defendant agreed to pay the same. The court held that it was not bound to follow the decisions of the Maryland courts in this respect and that no rule of comity required the New York courts to enforce the tax laws of Maryland.

There are several cases in which plaintiffs have sought to obtain the assistance of the federal courts in levying taxes to pay interest and principal on bonds, and the courts have universally refused relief on the ground that the power to tax is purely a legislative function, and that it would be an invasion of such function by the judiciary of the federal government for it to levy and collect taxes.

Heine v. *The Levee Commissioners,* 86 U. S. 655 (1873);

Rees v. *City of Watertown,* 86 U. S. 107 (1873).

In *State of Arkansas* v. *Bowen,* 20 D. of C. Rep. 291 (1891), the Supreme Court of the District of Columbia refused to enforce a judgment obtained in Arkansas upon a bond, which included the amount of taxes which the county treasurer had purloined with high rates of penalties and interest. The court said, at page 295:

> "The question arises, whether, under such circumstances, this court should, by virtue of the laws of the United States or any comity that prevails between the States of this Union, entertain jurisdiction of this action. It has been very well settled that one State will not take cognizance of or enforce the judgment of another State where such judgment is founded upon penal laws or laws relating exclusively to the collection of the revenues

of the State wherein it is rendered. Such laws relating to the *domestic economy of the State,* and the management of its domestic affairs, are to be enforced directly by the courts of the State which enacts the laws, and not by the courts of other jurisdictions. This rule prevails under the international law between nations, and it has been held repeatedly that it prevails in the United States as between the States, and is not within the provisions of the Constitution of the United States which provides 'That the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered.' This does not relate to actions to recover penalties and fines, nor to actions authorized by statutes relating directly to the collection of the revenues of a State, or the enforcement of fines, penalties and forfeitures for non-compliance with or violations of such statutes.

"We find this principle clearly laid down in the case of *The State of Wisconsin* vs. *The Pelican Insurance Co. of New Orleans,* reported in 127 U. S., pages 289, 291, 292 and 293."

See also *Henry* v. *Sargeant,* 13 N. H. 321, 332 (1843).

(b)

The English decisions without exception recognize the same rule.

The rule announced by the American authorities as a principle of private international law, that one sovereign will not enforce the revenue laws of another sovereign, has prevailed in the English courts for almost two hundred years. The English cases apply the rule not only to claims made by foreign sovereigns, but also to claims made by Dominions of the British Empire, and political subdivisions thereof.

The rule was recently applied in *In re Visser* (1928), 1 Chancery 877. The plaintiff, the Queen of Holland, sought to recover for succession duties imposed by the law of Holland upon the estate of a Dutch subject who at the time of

his death in Amsterdam was domiciled in Holland. One of the defendants was executor of the will of the decedent, and he, and another defendant, were sued as executors or administrators. The third defendant, who was acting under a power of attorney from the executor, was sued as administrator of the personal estate in England. The plaintiff claimed that by the Dutch Succession Act the amount of succession duty constituted a debt from the estate to the Queen of Holland, with priority over all other unsecured debts. Upon motion to strike out the claim on the ground that it disclosed no reasonable cause of action, the court granted the motion and dismissed the action of the Queen of Holland. The court said, at page 881:

> "The short ground for the application is that these Courts do not take notice of the revenue laws of a foreign State, and that the foreign State cannot sue in this country for the recovery of taxes falling to be paid under the foreign law. It seems to be plain that at any rate for somewhere about 200 years, since the time of Lord Hardwicke, the judges have had present to their minds the notion, and have repeatedly said that the Courts of this country do not take notice of the revenue laws of foreign States. In Dicey's Conflict of Laws, 4th ed. (1927), p. 224, the rule is stated in this way. Rule 54: 'The Court has no jurisdiction to entertain an action—(i.) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State.' Now it appears that that word 'revenue' appeared in the rule for the first time in 1922 in the 3rd ed., p. 230; and in the prior editions—the 2nd ed. (p. 207) and the 1st ed. (p. 220)—it was expressed to be only for the enforcement of a 'penal' law of a foreign country. 'Revenue' was added in 1922, and 'political' was added in 1927; and it now runs: 'directly or indirectly, of a penal, revenue or political law. * * *' I am now asked by Mr. Bennett to say that that is an addition that is not justified, and that the statement in the 4th edition is not well founded. Mr. Bennett argues that there has never been an actual decision in this country—at any rate except one decided comparatively recently in 1909—in support of that proposition, that what has been said has been

mere obiter, and therefore ought now, to-day, for the first time, to be disregarded. His contention is that whatever may be said as to there being no authority, no actual decision, in support of the proposition, there is certainly no actual decision which definitely establishes the contrary. Of course the absence of authority for what, on the one side, is called an elementary proposition, may indicate that the proposition is not well founded in principle, but it also may merely indicate that it is so well recognized that it has never been put to the test. A number of cases have been cited, and I agree with Mr. Bennett that it is very difficult to say of any of them that it is a direct decision, with the exception of one which I will mention. The same view of the matter seems to have been taken in America, although there again the case referred to does not appear to contain a direct assertion but only a dictum, and there is no case which supports the view that the revenue laws of a foreign country will be enforced here."

And at page 883:

"There remains the one case of *Municipal Council of Sydney* v. *Bull,* (4), before Grantham, *J.* I think it is plain that if the plaintiff there had been a foreign State instead of a foreign municipality, it would be impossible to say that it was not a direct decision in point. I do not see myself that any distinction, or valid distinction, could be drawn between a plaintiff sovereign State—a foreign sovereign State—and a plaintiff foreign municipality, seeking in the one case to recover State taxes, and in the other seeking to recover the local municipal taxes or rates; they seem to me to be in *pari materia,* and sitting here and being bound by the ordinary rule to follow decisions of coordinate jurisdiction, I should feel myself bound to treat the case of *Municipal Council of Sydney* v. *Bull* as one which it was my duty to follow, and to regard this matter as, so far as courts of first instance are concerned, disposed of by that case; and to leave it to higher jurisdictions to determine whether the rule ought to be maintained. That is apart from my own opinion. My own opinion is that there is a well recognized rule, which has been enforced for at least 200 years or thereabouts, under which these Courts will not

collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these Courts will not entertain. That being so, this application must succeed. The statement of claim must therefore be struck out and the action dismissed; and, as the soverign State has submitted to jurisdiction by coming here, I am in a position to order the sovereign State to pay the costs of the action."

In *Municipal Council of Sydney* v. *Bull* [1909], 1 K. B. 7, the Municipal Council of the City of Sydney, New South Wales, brought suit in the English courts for the recovery of an amount assessed against the owner of property in Sydney for a municipal improvement. The Council was authorized by an act of the legislature of New South Wales to recover by action the amounts assessed and was also given a remedy by distraint. In granting judgment for the defendant, the court said, at page 12:

"Mr. Foote contends that this enactment enables an action to be brought in this country and makes the Courts of this country auxiliary to the Colonial Courts to this extent at all events, that whereas before the enactment this claim could not have been recovered by means of an action in the Colony, it is now recoverable not only there, but in this country also. Now, in my view, that was not the object or intention of the enactment. Its sole object and intention was to provide that within that area where the claim was recoverable it might be recovered by an action. It was urged that this is in its nature a transitory action. I do not think it is. Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes. But what restriction is to be imposed on such legislation if this claim could be put in suit in this country? It is true that the contribution which the Municipal Council of Sydney seeks to levy upon the defendant is a contribution in money, but it might be exacted in another form; the Colonial Legislature might have enacted that of those persons whose property had been improved one should plant trees, another should lay drains, and a third should sink wells and find water-provisions which under certain

given circumstances might be as wise and equitable as the levy of a rate for contribution in money. Could the persons who omitted to perform these statutory obligations be sued in this country? Certainly not. And the mere fact that in New South Wales the contribution is a money contribution enforceable by action as well as by distress makes no difference. The action is in the nature of an action for a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State."

and at page 13:

"The contention of the plaintiffs would amount to this, that a foreign Legislature by imposing a personal liability upon its own subjects for its own municipal purposes can thereby impose upon the Courts of this country the duty of adjudicating upon questions which by the law of England are not properly cognizable by these Courts. In my opinion, the plaintiffs are no more entitled to recover the claim in England than the London County Council would be to recover in Sydney a penalty for a breach of their by-laws. There must be judgment for the defendant."

In *The Attorney-General for Canada* v. *William Schulze & Co.*, 9 Scots Law Times Reports 4 (1901), the Attorney-General for Canada brought an action for the recovery of costs awarded to the Crown in a proceeding in Canada arising out of an infraction by the defendant of the Canadian Revenue Laws relating to importations. The Lord Ordinary dismissed the action, saying, at page 4:

"But then comes the real difficulty of the case. It is a well-established rule of international law that the Courts of one country will not execute or enforce the penal laws of another; and this rule applies 'not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of Statutes for the protection of its revenue or other municipal laws and to all judgments for such penalties.' I quote these

words from the opinion of an American judge, because they were adopted with approval by their lordships of the Privy Council in the case of *Huntington* v. *Attrill* (1893, A. C. 150, at p. 157).

Accordingly, it was conceded by counsel for pursuer that, if he had been suing here for a penalty under the Revenue Statutes of Canada, the action would not have been maintainable. His argument is that this is not an attempt to enforce the execution of Revenue laws, that the forfeiture of the goods was complete before the litigation in Canada began, and that the costs were awarded to the Crown not as part of a penalty but as reimbursement of outlay occasioned by the fault of the defenders.

Now it is quite true that the litigation did not take the form of a suit for a penalty, but it is not accurate to say that the forfeiture was complete, in the sense of being final, before the litigation began. The question between the parties was truly whether the forfeiture was lawful, and if the defenders had succeeded the forfeiture would have been annulled. Accordingly, the suit was truly a Revenue suit; that is to say, in the sense of the international rule, it was a penal suit. The only question, therefore, is whether the costs of this penal suit can be so dissociated from the suit itself as to fall outside the rule of international law. I am of opinion that they cannot be so treated."

And at page 5:

"For these reasons, I am constrained to come to the conclusion that the action must fail. It is no doubt rather anomalous that the King, through his Courts in Scotland, should refuse to recognize a debt due to himself in Canada, merely because it arises out of the execution of a Revenue Statute. But it was not maintained, and I think is not maintainable, that in the sense of international law, the mother country and her self-governing colonies stand in different relationship from that which exists between two foreign states. If that relationship is ever to be modified it must be done by reciprocal legislation."

The relationship of the Dominions of the British Empire to the Empire itself bears considerable resemblance to the

relationship of the states to the United States. The last two cases show that the English courts recognize the impropriety of enforcing revenue laws of the Dominions in the English courts. In the last cited case, although the court recognized the incongruity of denying the Crown the right to sue in his courts in Scotland upon an obligation due him in Canada, nevertheless, it was held that the principle of private international law referred to, barred even such an action. That case surely presented a much more appropriate instance for entertaining jurisdiction than the action brought by the political subdivisions of the State of Indiana in the Federal Court sitting in New York.

Still more closely parallel to the present case is *City of Regina* v. *McVey,* 23 Ont. W. N. 32 (1922). In that case the Municipal Corporation of the City of Regina, in the Province of Saskatchewan, brought suit against a resident of the City of Ottawa, in the Province of Ontario, who had formerly been a resident of the City of Regina, for income taxes alleged to be due to the plaintiff for a portion of the year 1921. The report of the decision is as follows:

> "O'Brian, Co. *C. J.*, said that the case of *Municipal Council of Sydney* v. *Bull,* (1909) 1 K. B. 7, appeared to be fatal to the plaintiffs' right to recover for taxes, whether in respect of land or income, imposed under the authority of a foreign statute. The learned Judge could not find that the case had been overruled or modified by any later decision.
>
> "Judgment of nonsuit should be entered with costs."

While the decision is by a court of inferior jurisdiction it represents an application of the rule between the Provinces of the Dominion and indicates how completely the rule is intrenched in English jurisprudence.

The following English cases also recognize the force of the rule:

> *Holman* v. *Johnson,* 1 Cowper 341 (1775);
> *The Emperor of Austria* v. *Day and Kossuth* (1861), 3 De Gex, Fisher & Jones' Reports, 217, 241-242;

Huntington v. *Attrill* [1893], A. C. 150;
Cotton v. *Rex*, L. R. 1914, A. C. 176;
Indian and General Investment Trust, Limited v. *Borax Consolidated, Limited* [1920], 1 K. B. 539, 550;
The King of the Hellenes v. *Bostrom*, The Law Journal, July 14, 1923, at page 306 (not officially reported).

(c)

There is good reason for the rule recognized by the decisions and its application is peculiarly appropriate in the present case.

In Point III of the petitioner's brief it is argued that while criminal and penal liabilities should not be enforced outside of the jurisdiction imposing them, revenue laws stand upon a different basis and that no reason exists for failing to enforce them outside of the taxing jurisdiction. The ablest exposition of the reason for the classification of revenue laws with criminal and penal laws is to be found in the concurring opinion of Judge Learned Hand in the Circuit Court of Appeals in the present case, where he said:

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists in my judgment which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in foreign States if they run counter to the 'settled public policy' of its own State. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate, should

be, beyond the powers of a court; it involves the relations between the States themselves with which courts have no power to deal and which are entrusted to other authorities. It may commit the domestic State to a position which would be of serious moment to the foreign State. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper." (Tr. fols. 44-46.)

As we apprehend it, the point made by Judge Hand is that the courts of one state or a federal court sitting outside of the taxing state should refuse to entertain jurisdiction in any case where extraterritorial enforcement of tax liabilities is sought so that the court may not find itself in a particular case in the delicate and embarrassing situation of examining into the provisions for domestic order and economy of one of the states. Otherwise, the court would be obliged to determine in each case whether or not the nature of the tax and the manner of its imposition accorded with the public policy of the jurisdiction in which enforcement was sought. The petitioner suggests that such inquiry would not be troublesome and that as a practical matter no attempt would ever be made to enforce taxes where the tax or the method of its imposition did not accord with the policy of the state or federal court in which enforcement was sought. The petitioner argues that the tax programs of the states are generally similar to the tax programs of the federal government and, therefore, that the federal courts at least would never have occasion to prosecute the inquiry, the danger of which Judge Hand emphasizes as a reason for refusing jurisdiction. The petitioner then argues at page 20 of his brief, "It is necessary for the federal court only to determine whether the Indiana laws in question agree with its own notions of what is proper. These laws are ordinary personal property tax laws. There can be no question as to their propriety."

This argument shows the vice of the whole contention.

According to the petitioner's argument tax laws are to be classified for purposes of jurisdiction of the federal courts. Some tax laws, that is, those which are not similar to tax laws enacted by Congress, are to be classed with criminal and penal statutes. Others are not. Those which are not classed with criminal and penal statutes are to be examined by the federal court in which enforcement is sought and if found to accord with the policy of the examining court, are to be enforced there. Such procedure, however, would involve the prosecution of the inquiry suggested by Judge Hand and we submit that, aside from every other consideration, its prosecution by a federal court outside of the taxing state would present a greater source of political embarrassment and a greater departure from the judicial function than would be presented by the prosecution of that inquiry by the courts of one of the states. Its complications are particularly evident in this case. The petitioner has sought to invoke the jurisdiction of the Federal Court sitting in New York because the state courts would not recognize his claim. It is to the state courts that the defendants as executors are accountable. In those courts from which their authority is derived they would not be required to pay the petitioner's claim. If the Federal Court entertained jurisdiction of this suit and if the petitioner recovered judgment the recovery of such judgment would conflict directly with the state policy clearly declared by the Court of Appeals in the state in which the Federal Court is sitting. But before any such judgment could be recovered, in the event that the District Court should be compelled to take jurisdiction of the suit, the District Court would have to examine at the trial the statutes of Indiana to determine whether or not there were any taxes for which the defendants could be held liable. That examination would require the court to determine whether or not the taxing statute was valid and whether or not the procedure followed for assessment resulted in a valid assessment. In these respects it would have to consider whether it would apply the policy of the decisions in Indiana, the policy

of the decisions in the New York state courts or some separate policy of its own. It would find, perhaps, that in the Indiana courts the taxes would be regarded as properly assessed. It would find that under the decisions in New York they were not, and sitting in New York it would have to evolve some policy which would reconcile this square conflict of authority and justify it in imposing upon the defendants an obligation which the court conferring upon them their authority as executors would deny. It is difficult to conceive of a situation in which the Federal Court would be required more clearly to interfere in problems of domestic economy in two states than in the present case.

The petitioner contends that the Federal Court should take jurisdiction and so precipitate itself into these problems of domestic order solely because a political subdivision of the State of Indana was unable or unwilling to exercise diligence in collecting the taxes alleged to be due it. As Judge Manton said in the prevailing opinion in this case, "The taxing power of a State is by the federal constitution limited to persons and property within its jurisdiction." (Tr. fol. 37.)

The only reason offered for opening the Federal Court in New York to this plaintiff is that he has been unable to collect the taxes from persons and property within the jurisdiction of Indiana and that unless the Federal Court here is open to him, the Treasurer and Grant County will lose their respective shares in the taxes sought to be recovered.

We hardly need add that if this Court should hold that the District Court should have taken jurisdiction of the suit it will flood the federal courts with actions by taxing authorities whose neglect and delinquency could not otherwise be repaired. While this is perhaps not a reason for affirming the decisions of the courts below if they were not supported by authority, we submit that it is an appropriate consideration indicating the wisdom of the rule announced by all of the authorities and followed by the courts below. If the Federal Court in New York were required to take jurisdiction it would also result in an intolerable uncertainty in the admin-

istration of estates in New York and states following the rule announced in New York. In determining for what tax claims an estate would be liable, the representatives of an estate would have to ascertain the places of residence of their decedent from the time he owned any property which might by any possibility be deemed taxable by any state in which he had resided, then ascertain what part of said property was taxable by the state and what part by its several subdivisions. The representatives would then have to arrange payment of such of the claims of political subdivisions as exceeded $3,000 and to such of the subdivisions as would be likely to bring suit in the federal courts. They would not be required to make provision for taxes due the states because under the decisions the states would not have access to the federal courts for the collection of their taxes inasmuch as they would not be able to establish the necessary jurisdictional requirement that there should be a controversy between citizens of the several states.

The petitioner in Point IV of his brief refers to a note in the Columbia Law Review discussing the opinion in the Circuit Court of Appeals in the present case. It is argued from this discussion that the rule inhibiting the enforcement of revenue laws outside of the enacting jurisdiction had its origin in conditions of commercial rivalry and that its modern application is only justified between nations, where conditions of commercial rivalry exist. Whatever the origin of the rule may have been it does not now rest upon so insubstantial a foundation. Its application by the English courts in actions involving the Dominions and their political subdivisions, and its applications by the New York state courts and by the lower courts in the present case, show that the present logic of the rule is based upon the unwillingness of the courts of one sovereignty to subject to analysis and inquiry the domestic policies of another. We have already pointed out how compelling a reason for the rule this is in the federal courts. At page 24 of the petitioner's brief, in commenting upon the origin of the rule, it is said, "Even

were there sufficient reason to apply the rule as between the several states of the Union, as for instance, a desire to get the property of the tax-debtor within the state's territory for the benefit of its own citizens, no such reason obtains as between nation and the states. The policy of the nation toward the states is one of co-operation and not of rivalry." Whatever general application such description of the relation between the states and nation may have when reference is made to the common problems which the national government, by reason of its greater resources and centralized facilities, may perform for and with the states, it has no meaning in the present connection.

We assume that the quoted phrase from the petitioner's brief is used to suggest that the Federal Court sitting in New York should co-operate with Grant County, Indiana, so that Grant County, Indiana, may collect its taxes from persons and property within the State of New York and not within the State of Indiana, but we submit that nowhere is there authority for making the Federal Court in New York a tax-collecting agent for Grant County, Indiana. While the function of the Federal Court sitting in New York has perhaps not been defined for all purposes, the origin of the federal judicial system suggests that that court was designed to be an impartial tribunal, free from local prejudice against citizens from other states, administering the law of New York as conceived by the Federal courts sitting in New York insofar as the constitution and statutes of the United States do not require a different law to be administered. If the Federal Court sitting in New York has any duty to co-operate, or if there is any federal policy indicating that the Federal Court should co-operate with the states, it would seem reasonable that in the absence of controlling federal law to the contrary the Federal Court sitting in New York should first concern itself with co-operation with the state in which it sits, but the petitioner suggests that the one system of law to which the Federal Court should yield no allegiance whatever is the system

prevailing in New York, the state in which it sits. This must be so for the petitioner claims that the District Court sitting in New York should entirely disregard the state rule which is binding upon these defendants as executors, and should impose upon them an obligation repudiated by the courts from which they derive their authority, so that the petitioner and Grant County, Indiana, may share the fruits of the exercise of jurisdiction.

At pages 20 to 22 of the petitioner's brief it is argued that federal courts do not enforce the penal or criminal laws even of the states in which they sit, but that they do enforce revenue laws of the states in which they sit. The petitioner concludes, therefore, that revenue laws are upon a different basis from penal or criminal laws and that the fact that a federal court is not sitting in the taxing jurisdiction does not deprive it of jurisdiction to enforce a revenue law enacted elsewhere. In support of this argument the petitioner states at page 21 of his brief, that the reason for non-enforcement of penal and criminal laws, even in the district in which the federal court sits, is that the federal and state sovereignty is distinct and independent. This sufficiently disposes of the balance of his argument and clearly justifies the application of the rule as between separate sovereigns that one sovereign will not enforce the revenue laws of another. Moreover, the premises of the argument are faulty because the petitioner has been unable to cite a single case in which a federal court has entertained jurisdiction to collect taxes even for the state in which it sits where the question of its jurisdiction has been raised. The cases cited at page 22 of the petitioner's brief show plainly that the jurisdiction of the federal court was not questioned, and in the last two cases cited the reason for the exercise of jurisdiction was that it had been invoked by the taxpayer upon removal by him and accordingly, he was in no position to question the jurisdiction. While the cases cited by thepetitioner do not hold that a federal court has jurisdiction to enforce revenue laws even of the state in which it sits, a case holding that the federal court had such jurisdiction would not affect the result here for it is clear

that a fundamental distinction exists between the duties and powers of a federal court in the taxing state and one sitting elsewhere.

Reference is made by the petitioner to the provision of the Bankruptcy Act directing the payment of taxes and to cases thereunder holding that taxes due to states other than that in which the court administering the estate is sitting may be allowed as claims in bankruptcy. The allowance of such claims is based upon a statutory provision permitting their allowance and affords no authority for the extraordinary jurisdiction which the petitioner seeks to invoke here.

In Point VII of the petitioner's brief it is argued that extraterritorial imposition of tax laws must be distinguished from extraterritorial enforcement of such laws and it is urged that the latter is constitutionally unobjectionable. This argument was made in the Circuit Court of Appeals by the petitioner and was dealt with by Judge Manton as follows:

> "The appellant's argument that the extraterritorial imposition of tax is to be distinguished from the extraterritorial collection or enforcement of the tax, is without merit. The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution, Indiana had no jurisdiction to impose a tax because neither the property or the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the national district court outside of the state to collect such tax." (Tr. fols. 39-40.)

If there be any distinction between extraterritorial imposition of a tax and extraterritorial collection of a tax it does not aid the petitioner in this case. We assume that the distinction which the petitioner attempts is between the levying of taxes by a state where neither the person who is to pay the tax nor the property taxed is within the state, and the levying of a tax by a state where either the person to be taxed

or the property to be taxed is within the state and the state seeks to collect the tax elsewhere. In the first case it is apparent that the tax is wholly void. If, in the first case, a state seeks to collect taxes so imposed in the courts of another jurisdiction such collection is inhibited by two rules, the first, a rule of constitutional law which requires that the state must have jurisdiction of person or property before a valid tax can be levied, and the second, a rule of international law which prohibits the courts of one sovereignty from giving any effect to the revenue laws of another. The prevailing opinion in the Circuit Court of Appeals took the view that the effort of the petitioner in this case was to collect taxes imposed without jurisdiction to tax and that the Federal Court in New York had no jurisdiction for both reasons. Judge Learned Hand's concurring opinion shows that he took the view that the Federal Court should not entertain jurisdiction for the second reason only.

In the second case, that is, in the case of what the petitioner apparently conceives to be extraterritorial enforcement of a tax, it is assumed that the state has jurisdiction to tax. The petitioner argues that in such case, since the state has jurisdiction to tax, there is no constitutional objection to the maintenance of suit to collect the tax in another jurisdiction. He argues that it gives rise to a transitory cause of action which may be enforced anywhere. Judge Learned Hand in his concurring opinion says with respect to this, "Generally it is of course true that a liability arising under the law of a foreign State will be recognized by the courts of another, and it is not here relevant whether foreign liability is enforced, or another, precisely similar, raised by the law of a forum." (Tr. fol. 44.)

But whether the liability is under the foreign law or another, it can only be enforced with the consent of the forum, that is, the forum must be willing to entertain jurisdiction and enforce the liability unless the liability is of the character dealt with by the full faith and credit clause of the Constitution.

As we have pointed out above it seems plain that the attempt to assess taxes in this case did not result in an imposition of a valid tax liability. This was the view taken by two of the judges in the Circuit Court of Appeals, but it is unnecessary at this time to determine that question unless this Court feels that the rule of international law applied in the courts below should be abrogated. If the District Court should have disregarded the rule of international law, which is sustained by all the authorities we have cited, and does not depend for its virtue solely upon its antiquity, then the question of whether or not a valid assessment was made becomes important. The determination of that question, however, need not be made at this time because if the Court decides that the District Court should have entertained jurisdiction, then the question of the validity of the assessment may await a trial after the defendants have pleaded.

Accordingly, if we understand the distinction made by the petitioner between extraterritorial imposition and extraterritorial enforcement of tax, that distinction is of no avail to the petitioner in this case because whichever somewhat tenuous classification covers the present suit it is barred by at least one fundamental principle.

The petitioner argues that this is merely an action to collect a tax liability validly imposed and accordingly is not an action to enforce a revenue law as such. It is apparent that the true nature of this action cannot be concealed by any form of words. It is and remains an action to collect taxes alleged to be due to the plaintiff in his official capacity. The only statute pleaded in the complaint from which the petitioner claims the right to maintain the present action gives the Treasurer the right to "institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes * * *." (Statutes of Indiana, 1927, Chap. 54, page 141, Section 1, Tr. fol. 19.) If any valid tax was imposed this is and can only be, an effort to collect it. It is necessarily, therefore, an attempt to enforce a revenue law against persons and

property which were not within the State of Indiana at the time of the alleged assessment. All of the authorities which we have cited deal with a precisely similar situation. The *Harbeck* case goes a step farther than the other cases, for in that case there was no jurisdiction to tax. While we claim that in this case also there was no jurisdiction to tax, that question only becomes of importance, as we have pointed out, if the rule of private international law announced in all the cases is to be set aside.

POINT II.

Neither the view taken of these taxes in Indiana by the legislature or the courts, nor the alleged similarity between that view and the view taken by the federal courts of federal taxes justifies reversal.

In Point V of the petitioner's brief a lengthy argument is made based upon the statutes and decisions in Indiana that the taxes for the years 1903 to 1926 for which this suit was instituted, although not liquidated or indeed actually assessed until after the death of the decedent at a time when neither the decedent's property nor the defendants as executors were in the State of Indiana, were validly imposed and resulted in a valid liability which may be enforced here.

The prevailing opinion in the Circuit Court of Appeals dealing with this phase of the matter is as follows:

> "Assuming Breed was domiciled in Indiana, as alleged in the complaint, the taxes were not assessed until after his death and until after the appellees were administering his estate in the jurisdiction of the New York Surrogate's Court. The amount of the tax had not been ascertained and no attempt was made to impose the taxes prior to death. The Indiana statute imposes a duty upon the resident to report taxable property. It creates no liability before the amount of taxes claimed

is determined. It was necessary for the taxing authorities to assess the taxes and determine the amount claimed to be due. It is not a transfer tax or a succession tax claimed, but a personal property tax. The application of the fiction of *mobilia sequuntur personam* would require an assessment during each of the years for which taxes are claimed, during the lifetime of the decedent, to reach the conclusion that there was a personal liability to pay these taxes during his life. Jurisdiction is not to be founded upon a multiplication of fictions and in no true sense can it be said that Indiana had jurisdiction to impose the taxes for which this suit is brought." (Tr. fols. 40-42.)

Judge Learned Hand in his concurring opinion concluded that the liability was valid. We have pointed out above that the determination of this question need not be made at this time. The first question to be determined is whether or not the District Court should have taken jurisdiction even if the tax was validly imposed. If it should have entertained jurisdiction, the consideration of the validity of the tax can await further proceedings in the action after the defendants have had an opportunity to answer. We contend that the prevailing opinion in the Circuit Court of Appeals properly concluded that the action of the taxing authorities referred to in the complaint did not result in the imposition of a valid tax, because neither the defendants nor any of the decedent's property is alleged to have been within the State of Indiana at the time the amount of the tax was determined. The solution of this problem does not depend upon the statutes or decisions of the State of Indiana but upon constitutional considerations, and the decisions and statutes of Indiana are, of course, not binding upon the Federal Court sitting in New York. In view of the fact that the determination of the validity of the imposition of the tax does not seem to be necessary to a determination of this appeal we shall not burden the Court with discussing the authorities cited by the petitioner in Point V. We do not, however, in any way concede that the taxes were validly imposed and we submit that the Circuit Court of Appeals in its prevailing opinion properly held that they were not.

In Point VI of the petitioner's brief an attempt is made to show that there is a fundamental distinction between the conception of tax liability entertained by the federal courts and the conception thereof entertained by the courts of some of the states. To establish this contention the petitioner cites various decisions relating to the collection of federal taxes in federal courts. Obviously these have no application to the present problem. The fact that in federal courts under federal statutes the federal government is permitted to maintain an action of debt or some other form of action does not furnish any authority for the present action or indicate in any way that in a federal court the liability to pay taxes to a state outside of the state in which it is sitting is to be enforced by an action of debt or any other form of action. The argument of the petitioner appears to be that since federal taxes may be collected in federal courts by an action of debt and the Indiana statutes and decisions make taxes such as are sought to be collected here, subject to collection by an action similar to that of debt, the Federal Court in New York must permit the plaintiff to maintain an action of debt for these taxes. The most that these cases suggest is that if the federal courts were to entertain actions for the collection of taxes due to states other than those in which they are sitting there would be no public policy hostile to the maintenance of such action in the form of an action in debt, but this does not aid the petitioner here. It is not the form of the action which furnishes the reason for denying the petitioner access to the Federal Court in New York, it is the substance of the action. There is no indication of any kind in any of the federal cases cited by the petitioner at this point or indeed at any point in his brief which furnishes any basis for the maintenance of the present action.

The argument at pages 45 to 47 of the petitioner's brief under Point VI is that the Federal Court in New York sits to administer the statutes of Indiana. The cases cited by the petitioner, however, merely hold that the federal courts will take judicial notice of the statutes of the states composing the Union. While the Federal Court in New York may

take judicial notice of the statutes of Indiana it may also refuse to enforce those statutes where they relate solely to the collection of revenue because the federal courts ouside of Indiana are not obliged to afford extraterritorial effect to the laws of Indiana as a matter of comity. As this Court said in *Huntington* v. *Attrill*, 146 U. S. 657, 683, in considering whether or not a state or federal court in which suit was brought on a judgment was free to determine for itself whether or not the judgment was based on a penalty:

> "In this view that the question is not one of local, but of international law, we fully concur. The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.
>
> "In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought."

The doctrine of this case applies equally to actions to enforce revenue laws and the same reason which suggests that penalties under state statutes are not to be enforced in the federal courts or the courts of other states applies with equal force to actions to enforce revenue laws. Under our system of government a state may be able to impose by force certain obligations upon its citizens within its own borders in the nature of taxes or penalties which it cannot impose by right in other jurisdictions.

Conclusion.

The judgment of the Circuit Court of Appeals should be affirmed. The decisions of the District Court and of the Circuit Court of Appeals follow all of the American and English authorities which have had occasion to deal with this question. Those authorities show that the rule has been subjected to frequent reexamination and the basis of the rule is

that the courts of one sovereign should not sit in judgment upon the provisions for the domestic economy made by another sovereign. The consideration of those provisions involves political considerations of the first moment. It would be peculiarly unfortunate for a federal court to put itself in the position of arbitrator between the public policies of the state in which it sits and other states. That is what the plaintiff asks it to do here and the District Court properly refused to assume jurisdiction. Aside from the powerful current of authority in favor of the rule applied in the courts below, based upon sound considerations of policy, the practical result which would follow a reversal would be to open the federal courts to a great variety of tax collecting litigation by the political subdivisions of all of the states, and to remove from the citizen the protection afforded by the requirement that taxes must be collected from persons and property within the taxing jurisdiction. In addition to these general considerations the position of these defendants as executors would be that they might be subjected to a liability to pay a substantial judgment, the proceeds of which would be divided between the plaintiff in his individual and in his official capacity, for which they might be personally responsible because of the rule in the state courts which the plaintiff has sought to escape by commencing this action in the Federal Court. The District Court properly refused to substitute its process for diligence on the part of the tax collectors of Grant County, Indiana.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

GRAHAM SUMNER,
Counsel for Respondents.

LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
FRANCIS H. HORAN,
on the brief.